
COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. DAR-23788
(Appeals Court Case No. 15-P-1279)

BANK OF AMERICA, N.A.,
as Trustee for Certain Trusts,

Appellants,

v.

COMMISSIONER OF REVENUE,

Appellee.

On Appeal from a Decision of the Appellate Tax Board

APPELLANT BANK OF AMERICA, N.A.'S APPLICATION
FOR DIRECT APPELLATE REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to S.J.C. Rule 1:21, Appellant Bank of America, N.A. states that it is a wholly owned subsidiary of Bank of America Corporation, a publicly traded corporation (ticker symbol: BAC). Bank of America Corporation has no parent corporation and no publicly held corporation holds ten percent or more of its stock.

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I. REQUEST FOR DIRECT APPELLATE REVIEW

Appellant Bank of America, N.A. (the "Bank"), as trustee for 34 trusts (the "Trusts"), respectfully requests that the Court grant direct appellate review under Mass. R. A. P. 11(a) in this consolidated appeal from a decision by the Appellate Tax Board (the "Board"). The Board's decision, which denied applications for abatement of fiduciary income taxes that the Trusts paid for the 2007 tax year, raises important questions of first impression concerning the interpretation of Massachusetts's fiduciary income tax law as applied to trusts administered by corporate trustees.

The Board's erroneous resolution of these questions expands the Commissioner of Revenue's ("Commissioner") taxing authority far beyond what the Commissioner advocated, what the Legislature provided, and what the U.S. Constitution allows. The Board's decision has broad implications for national financial institutions and the trusts they manage, affecting not only the Trusts in this case but thousands of other trusts — including, at a minimum, nearly 3,000 other trusts managed by the Bank alone. This appeal thus is a paradigmatic example of the type of case for which

direct appellate review was intended. See Mass. R. A. P. 11(a).

II. STATEMENT OF PRIOR PROCEEDINGS

The Bank timely filed approximately 2,987 abatement applications with the Commissioner for the 2007 tax year concerning trusts for which the Bank served either as sole trustee or as co-trustee with a natural person who is not an inhabitant of the Commonwealth.¹ DAR App. 593.² After the Commissioner did not act on the Bank's applications within the statutorily required six-month period, the Bank withdrew its consent to waive that time limit with respect to 34 of the applications, resulting in the deemed denial of those applications under G. L. c. 58A, § 6. Id. at 593-94.

In November 2011, the Bank filed timely petitions with the Board for each of the 34 applications seeking to overturn the deemed denials. Id. at 594. The parties agreed to designate four trusts (the

¹ The Bank also filed thousands of applications for abatement of the fiduciary income tax for tax years 2008 through 2011, the tax years for which the applicable statute of limitations to seek tax abatement have run.

² For the Court's convenience, the Bank has provided an appendix of record materials supporting its application for direct appellate review. Materials in the appendix are cited herein as "DAR App. ____."

"representative trusts") for purposes of adjudicating the same legal issues with respect to all 34 abatement applications. Id.

At a brief hearing before the Board on April 29, 2013, the parties submitted a statement of agreed facts ("SAF") and 64 accompanying exhibits ("Ex."). The parties then simultaneously exchanged opening briefs on July 16, 2013 and reply briefs on August 13, 2013. No oral argument was held. On April 4, 2014, the Board issued a summary decision upholding the Commissioner's denial of the Trusts' abatement applications. Both the Bank and the Commissioner filed requests for findings of fact and a report under G. L. c. 58A, § 13, and 831 Code Mass. Regs. § 1.32.

On June 10, 2015, the Board issued its findings of fact and report, holding that the Bank is an "inhabitant" of the Commonwealth under G. L. c. 62, § 1(f)(2), and therefore that the Trusts are subject to the fiduciary income tax under G. L. c. 62, § 10(a) and (c). See infra at 18-21.

The Bank filed a timely notice of appeal with respect to all 34 abatement applications on August 5, 2015. The Appeals Court consolidated the Trusts' appeals and docketed the matter on September 21, 2015

(No. 15-P-1279). The Bank then moved in this Court to enlarge the time for seeking direct appellate review. The Court effectively allowed that motion, stating that it would consider the motion to enlarge time together with the application itself, if the application were filed by October 30, 2015.

III. STATEMENT OF FACTS RELEVANT TO THE APPEAL

A. The Trust-Administration Business

A trust is a fiduciary relationship in which the trustee holds legal title to the trust's assets, subject to obligations to manage those assets for the benefit of one or more beneficiaries. See Restatement (Third) of Trusts § 2 (2003).

The role of a trustee includes both powers and duties. Id. § 70; see also G. L. c. 203E, §§ 801-17. For example, a trustee who has been entrusted with a corpus containing investment securities typically has the power to sell those assets, insure them, borrow money against them, and reinvest them. See G. L. c. 203E, § 816. Those powers in turn are qualified by duties owed to the beneficiaries, including (among others) duties to invest trust assets prudently and productively; to keep records and accounts; to report to the beneficiaries; and to make required

distributions and decide discretionary distribution requests. See G. L. c. 203E, §§ 801-04, 809-10, 813. The Trustees' exercise of these powers and duties is referred to as "trust administration." See, e.g., 3 A.W. Scott, et al., Scott and Ascher on Trusts § 16.1, at 1021 (5th ed. 2007).

Historically, natural persons were selected to serve as trustees. Today, it is common for those creating trusts ("settlers") to select a business entity (e.g., a corporation) to be the trustee, typically a bank or a specialized trust company that is authorized by its charter and applicable law to serve in that capacity.³ There are many reasons that may explain the decision to select a corporation instead of a natural person to be the trustee for a private trust, including continuity, collective experience and expertise, recordkeeping, and regulatory oversight. See N.L. Mills, The Advantages

³ See, e.g., G. L. c. 167G, § 2 (allowing Commissioner of Banks to authorize banks to maintain specialized trust departments); G. L. c. 172, § 1 et seq. (authorizing formation and regulating activities of trust companies); 12 U.S.C. § 92a (allowing federal Comptroller of Currency to authorize national banks, such as Bank of America, to act in same fiduciary capacity as state banks); 12 C.F.R. § 9.7 (authorizing national banks to act in fiduciary capacity); G.G. Bogert, et al., Bogert's Trusts and Trustees §§ 131, 134-36 (2015).

of a Corporate Fiduciary, 24 Miss. L.J. 456, 457 (1953).

Corporate trustees often employ a number of persons who participate in administration of any given trust. For example, a corporate trustee may employ a trust officer who communicates with beneficiaries, distributes trust proceeds, and makes policy and discretionary distribution decisions - decisions which may require first obtaining approval from others under the terms of the trust, applicable laws and regulations, and the corporate trustee's own policies and procedures. See Office of Comptroller of Currency, Comptroller's Handbook: Asset Management - Personal Fiduciary Activities 34 (Feb. 2015) (hereinafter, "OCC Handbook").⁴ Corporate trustees also may employ, e.g., portfolio managers who make investment decisions, accountants who assist in preparing financial reports and tax returns, attorneys, and other officers who perform legally required annual reviews of all trust accounts as part of a fiduciary committee. See 3 E.F. Koren, Estate, Tax and Personal Financial Planning § 30:54 (2015); OCC Handbook at 31-33. Depending on

⁴ Available at <http://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/am-pfa.pdf> (last accessed Oct. 27, 2015).

the company and how it is organized, these employees, all of whom may share administrative responsibilities for a particular trust or set of trusts, might be located all in one State or in a number of different States.

B. Massachusetts's Fiduciary Income Tax Framework

Most (but not all) States impose a tax - generally referred to as a "fiduciary income tax" - on the incomes of "resident" trusts. States vary, however, as to how they define a "resident" trust or trustee for purposes of their fiduciary income tax, particularly when the trustee is a corporation rather than a natural person.

In many States, whether a trust is subject to tax turns on where the corporate trustee transacts the major portion of its administration of the trust. E.g., Cal. Rev. & Tax. Code § 17742(b) (for purposes of assessing fiduciary income tax, "the residence of a corporate fiduciary of a trust means the place where the corporation transacts the major portion of its administration of the trust"). In other States, whether the tax is applicable depends on multiple factors, including the trustee's domicile, the trust's corpus's location(s), and the source(s) of the trust's

income and gains. E.g., N.Y. Tax Law § 605(b)(3)(D). In still others imposition of the tax turns on the settlor's and/or beneficiaries' residence, irrespective of the trustee's residence, e.g., 35 Ill. Comp. Stat. §§ 5/201(a), 5/1501(a)(20)(D), though the constitutionality of such a tax basis is questionable. See infra at 30-31 & n.7.

The Massachusetts fiduciary income tax fits cleanly into none of these categories. The tax is imposed under G. L. c. 62, § 10(a), which provides:

The income received by trustees or other fiduciaries described in subsection (c) of this section shall be subject to the taxes imposed by this chapter to the extent that the persons to whom the same is payable, or for whose benefit it is accumulated, are inhabitants of the commonwealth.... Income received by trustees or other fiduciaries described in subsection (c) of this section which is accumulated for unborn or unascertained persons, or persons with uncertain interests shall be taxed as if accumulated for the benefit of a known inhabitant of the commonwealth.

G. L. c. 62, § 10(a).

Application of Section 10(a) is limited by Section 10(c), which provides that the fiduciary income tax applies only if, inter alia, the trust is administered by an "inhabitant" of Massachusetts:

[Section 10(a)] shall apply to ... trustees under a trust created by a person or

persons, any one of whom was an inhabitant of the commonwealth at the time of the creation of the trust or at any time during the year for which the income is computed, or who died an inhabitant of the commonwealth, any one of which trustees or other fiduciaries is an inhabitant of the commonwealth....

G. L. c. 62, § 10(c) (emphasis added). Thus, two requirements must be met under Section 10(c) for the tax to be imposed: (1) the settlor must have been a Massachusetts "inhabitant" when the trust was created or when he died, or at any time during the relevant tax year; and (2) a trustee must be a Massachusetts "inhabitant."

"Inhabitant" is defined in Section 1(f) as follows:

(f) "Resident" or "inhabitant", (1) any natural person domiciled in the commonwealth, or (2) any natural person who is not domiciled in the commonwealth but who maintains a permanent place of abode in the commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in the commonwealth, including days spent partially in and partially out of the commonwealth.

G. L. c. 62, § 1(f). Clause (2) was added to Section 1(f) in June 1995. St. 1995, c. 38, § 65. Before that amendment, the definition of "resident" or "inhabitant" was limited to what is now found in clause (1): "any natural person domiciled in the

commonwealth."

Both clauses in Section 1(f) refer only to a "natural person." There is no dispute, however, that the fiduciary income tax applies to the income received by corporate trustees to the extent that they too are "inhabitants" of the Commonwealth. This follows from G. L. c. 62, § 14, which provides:

[C]orporations acting as trustee or in any other fiduciary capacity shall, with respect to the income received by them in that capacity, be subject to this chapter in the same manner and under the same conditions as individual inhabitants of the commonwealth acting in similar capacities....

G. L. c. 62, § 14. The Bank does not dispute that corporations domiciled in Massachusetts are inhabitants of the Commonwealth for purposes of the fiduciary income tax.

There is a dispute whether corporations not domiciled in Massachusetts can be deemed inhabitants of the Commonwealth under Section 1(f)(2). The phrase "permanent place of abode" used in that provision is not defined in the statute, nor is there any legislative history discussing it or the application of Section 1(f)(2) to corporations. About six months after the statute was amended to add Section 1(f)(2), the Commissioner provided some guidance as to its

meaning, in Technical Information Release 95-7 (Jan. 10, 1996) ("TIR 95-7"), DAR App. 448. There, the Commissioner explained that a "permanent place of abode" means "a dwelling place continually maintained by a person, whether or not owned by such person, and will include a dwelling place owned or leased by a person's spouse." Id. TIR 95-7 further explains that "[a] permanent place of abode generally will not include," inter alia, "a hotel or motel room," or "a dwelling place completely lacking both kitchen and bathing facilities, or a dwelling place that is not winterized." Id. at 448-49.

TIR 95-7 contains no discussion of whether or how the phrase "permanent place of abode" is applicable to a corporation. Before this case arose, there was no statement in any statute, regulation, or agency guidance concerning the application of the fiduciary income tax to corporations not domiciled in Massachusetts - including whether it should be applied at all.

C. The Bank And U.S. Trust

The Bank is a national banking association, organized and existing under Federal law, see 12 U.S.C. § 21 et seq., with its main office in

Charlotte, North Carolina. DAR App. 601. During the 2007 tax year at issue, the Bank's board of directors met in North Carolina, where its board minutes and corporate charter are retained. Id. In February 2008, the Bank merged with a different national banking association, United States Trust Company National Association ("U.S. Trust"); the Bank was the surviving entity of that merger. Id. at 594. During the 2007 tax year, U.S. Trust's main office was located in New York, New York. Id. at 601. U.S. Trust's board meetings also were held in New York, where its board minutes and corporate charter were kept. Id. Under G. L. c. 63, § 1, and 830 Code Mass. Regs. § 63.38.1(2), therefore, the Bank's "commercial domicile" during the 2007 tax year was North Carolina, and U.S. Trust's was New York.

Throughout the 2007 tax year, the Bank and U.S. Trust conducted business both within and outside the Commonwealth. In general, the Bank and U.S. Trust each made secured loans to Massachusetts residents, maintained branch offices and employees here, and advertised here. See DAR App. 599. The same was true, however, with respect to numerous other States. SAF ¶¶ 74, 77, DAR App. 282, 284. With respect to each

company's trust-administration business, some activities were performed in Massachusetts and others were performed out-of-State. SAF ¶¶ 71-72, 75-76, DAR App. 281-84.

D. The Trusts

This case concerns 34 inter vivos Trusts for which the Bank or U.S. Trust served as trustee during the 2007 tax year. DAR App. 594-95. Each of the Trusts was created by an inhabitant of the Commonwealth and each became irrevocable before the 2007 tax year, whether at creation or upon the death of the settlor. Id. at 598.

While each of the representative trusts - the actual taxpayers in this case - were created by Massachusetts residents, their ongoing connections to the Commonwealth in the tax years at issue were limited. None had any Massachusetts-source income during the 2007 tax year. Id. Nor were any of the trusts' beneficiaries known inhabitants of the Commonwealth: the fiduciary income tax potentially applies to the trusts only because their income was "accumulated for unborn or unascertained persons or persons with uncertain interests," and therefore the beneficiaries were assumed to be Massachusetts

residents by operation of G. L. c. 62, § 10(a). Id. at 603. Finally, none of the trusts had a Massachusetts-domiciled co-trustee. Id. at 598; SAF ¶¶ 20(g), 21(g), 22(g), 23(g), DAR App. 273-75.

The Bank and U.S. Trust did engage in some trust-related conduct in Massachusetts during the tax year at issue, but not all trust-administration work for the four representative trusts took place in Massachusetts. DAR App. 599-600; SAF ¶¶ 72, 76, DAR App. 282-84. With respect to the four representative trusts, the Bank and U.S. Trust "operated and staffed offices" in Massachusetts "for the purpose of fulfilling some of their obligations as trustees," "maintained relationships with the Trusts' beneficiaries," "administered the assets of the Trusts," "researched issues involving the Trusts in certain instances," and "discussed such issues with the grantors, beneficiaries, and/or their representatives." DAR App. 599-600 (emphasis added).

As the Board acknowledged, however, "functions relating to the management of the [t]rusts were also performed by personnel located outside the Commonwealth." Id. at 600 (emphasis added). Notably, "policy and procedures related to administrative and

investment components of [the] trusts generally were formulated by personnel located outside the Commonwealth." Id.

E. The Trusts' Applications For Abatement

On March 29, 2008, the Bank filed fiduciary income tax returns for the 2007 tax year for each of the 34 Trusts. DAR App. 595-97. The Bank subsequently filed timely applications for abatement with the Commissioner for each of those Trusts, seeking a refund of all taxes paid. Id. The Bank stated in these applications that because neither it nor U.S. Trust was a "resident" or "inhabitant" of Massachusetts during the tax year in question, the income that it or U.S. Trust received as trustee for the Trusts was not subject to taxation under G. L. c. 62, § 10. See Exs. 4, 8, 12, 16, DAR App. 316, 359, 389, 429.

The Commissioner did not act on the Bank's abatement applications within six months of filing, and in November 2011, the Bank withdrew its consent to waive the six-month requirement as to 34 Trusts under G. L. c. 58A, § 6, resulting in the deemed denial of those applications. DAR App. 595-98. The Bank thereafter filed its petitions with the Board, appealing the deemed denial of those 34 abatement

applications. Id.

F. The Parties' Positions

Before the Board, the Commissioner conceded that the Bank and U.S. Trust were not "inhabitants" of Massachusetts under Section 1(f)(1) because neither was domiciled here in 2007. DAR App. 529. The Commissioner also conceded, for purposes of Section 1(f)(2), that a corporation "does not occupy a dwelling or a habitation" and therefore the phrase "place of abode" can apply to a corporation only if a "broader formulation" of that term than applies to individuals is employed. Id.

Suggesting such a "broader" approach, the Commissioner argued that the Bank and U.S. Trust were "inhabitants" under Section 1(f)(2) because they had places of business in the Commonwealth and engaged in business here year-round. Id. at 529-32, 580-81. Importantly, the Commissioner's reply brief clarified her position that not any corporate activities should suffice to establish "presence" for purposes of Section 1(f)(2). Instead, the Commissioner argued that "it is appropriate and necessary to look to the activities of the fiduciary within the commonwealth," which "[f]or a corporate fiduciary" will be "the

activities it carries out in the course of performing its fiduciary responsibilities." Id. at 580-81 (emphasis added).

The Bank's principal argument to the Board was that a corporation's "inhabitancy" under Sections 1(f) and 10(c) should be limited to its common-law meaning (as recognized at the time of Section 10's enactment) of "domicile," which for a corporation is the State of incorporation. Id. at 480-86.

The Bank further argued that Section 14 must be interpreted in a manner that "achieve[s] equal treatment in the application of the fiduciary income tax regime" as between "a natural person or a corporate fiduciary." Id. at 499. The Bank observed that applying Section 1(f)(2)'s definition of "inhabitant" to a corporate trustee in the manner sought by the Commissioner would not "result[] in a similar treatment of natural person[s] and corporate trustees." Id. at 500. In contrast to natural persons, who are unlikely to be statutory residents of more than one State (beyond their domiciles), the Bank noted that it could be deemed a resident of "nearly every state" under an application of Section 1(f)(2) that equated "branch or trust offices with the

necessary 'permanent place of abode.'" Id.

The Bank also contested, inter alia, the Commissioner's "broader formulation" of the phrase "permanent place of abode," arguing that the Commissioner's approach would improperly extend the reach of an ambiguous taxing statute and thus run afoul of precedent requiring statutory ambiguities to be resolved against, not in favor of, the Commissioner. Id. at 550-52. The Bank further observed that the Commissioner's interpretation "would not be good tax policy" because, were other States to follow the agency's lead, it would result in "multiple - potentially voluminous - state return filings and trust-depleting state tax payments [that] would be highly burdensome to trusts and their beneficiaries." Id. at 559-60.

G. The Board's Decision

The Board agreed with the Commissioner's argument that the Bank and U.S. Trust were "inhabitants" of Massachusetts under Section 1(f)(2), though in doing so it broadened the Commissioner's proposed test for corporate inhabitation in ways that are central to this

appeal.⁵

As an initial matter, the Board did not accept the Bank's argument that Section 1(f)(2) should not apply to corporations at all, reading Section 14 as a command to find some application of Section 1(f)(2) to corporations. Id. at 611-14. As to how to apply Section 1(f)(2) and its "permanent place of abode" requirement to corporations, the Board acknowledged that "a corporation[,] by its nature, does not occupy a dwelling as does a person." Id. at 606-07. Nonetheless, the Board adopted the following broad definition of "place of abode" specifically for purposes of corporate trustees:

[A] corporation will qualify as an inhabitant of the Commonwealth within the meaning of §§ 1(f) and 10(c) if it maintains a permanent place in the Commonwealth at which it abides, i.e., where it continues to be and is stable in some state or constant in some relationship for the requisite number of days of a taxable year.

Id. at 608.

The Board then relied on the "presence and activities" of the Bank and U.S. Trust - many of which are unrelated to trust administration, both generally

⁵ The Board did not find that the Bank and U.S. Trust were domiciled in Massachusetts, and thus did not hold that they were "inhabitants" on the basis of Section 1(f)(1). DAR App. 606.

and with respect to the representative trusts - to conclude that they were statutory residents of the Commonwealth:

The presence and activities of the Trustees in the Commonwealth throughout the tax year at issue clearly satisfy these criteria. The Trustees' presence and activities in the Commonwealth, generally, included: developing and entering into banking and other commercial relationships, including making loans; with respect to the appellant, conducting business in more than 200 branch offices and with respect to US Trust, in two offices, all of which were staffed by the Trustees' employees; employing residents of the Commonwealth and independent contractors doing business within the Commonwealth; advertising; and operating as financial institutions engaged in business within the Commonwealth....

Id. at 608-09.

In addition to these non-fiduciary activities, the Board also noted the Bank's and U.S. Trust's activities with respect to the four representative trusts in particular "and trusts in general." Id. at 609-10. Nothing in the Board's decision suggested, however, that the decision turned on a finding that there had been trust-administration activities in Massachusetts, either generally or with respect to the

representative trusts.⁶ The Board thus adopted a far more expansive definition of corporate inhabitance than the Commissioner had advanced. See supra at 16-17.

IV. STATEMENT OF ISSUES OF LAW RAISED BY THE APPEAL AND STATEMENT REGARDING PRESERVATION OF ISSUES OF LAW BELOW

This appeal raises the following issues of law:

1. Whether the statutory definition of "resident" and "inhabitant" in G. L. c. 62, § 1(f)(2), applies to corporate trustees.

2. Whether, if G. L. c. 62, § 1(f)(2), applies to corporate trustees, the Board's construction of that provision errs by holding that a corporate trustee is a statutory resident so long as it has any "presence and activities" in the Commonwealth for more than 183 days during the tax year.

As discussed above, see supra at 17-18, these issues were raised and properly preserved below. See G. L. c. 58A, § 13.

⁶ Lest there be any confusion, some of the trust-related activities highlighted by the Board indisputably did not occur in Massachusetts with respect to the representative trusts. See DAR App. 599-600 (identifying activities that were conducted in Massachusetts for trusts generally but not the representative trusts) and id. at 609-10 (relying in part on such activities in holding that the Bank and U.S. Trust are Massachusetts inhabitants).

V. BRIEF ARGUMENT ON ISSUES RAISED BY THE APPEAL

The Board's holding that Section 1(f)(2) reaches any national corporation with some permanent physical presence in the Commonwealth and conducting more than seasonal business here is wrong on two levels.

First, the Board can point to no unambiguous language requiring the taxation of corporate trustees under Section 1(f)(2). The Board erred by making up a tax rule not expressly stated in the tax code and resolving statutory ambiguity against the taxpayer.

Second, the Board's rule treats corporate trustees differently and unfavorably from individual ones - the opposite of what Section 14 requires. Any ambiguity in application of Section 1(f)(2) must be read in favor of the taxpayer and thus a narrower test for inhabitance is required. The Board's broad reading of Section 1(f)(2) also would violate the Dormant Commerce Clause of the U.S. Constitution. If the Court decides that Section 1(f)(2) should be applied to corporations, then it should adopt an inhabitance test that treats corporate and individual trustees equally and that avoids the constitutional issue.

A. Section 1(f)(2) Does Not Apply To Corporations.

On its face, Section 1(f)(2) only adopts a

special statutory definition of "inhabitant" for natural persons; there is no clear indication that, as to corporations, the Legislature intended a meaning of "inhabitant" different from domiciliary to apply. That conclusion is strengthened by the fact that Section 1(f)(2) only makes sense as applied to natural persons. It therefore was a mistake for the Board to apply Section 1(f)(2) to corporations at all.

The concepts employed by Section 1(f)(2) do not apply to corporations. The Commissioner conceded below that, unlike individuals, a corporation "does not occupy a dwelling or habitation." DAR App. 529. The Commissioner's 1996 guidance is consistent with that view, explaining that a "permanent place of abode" means an all-season home, as opposed to a seasonal cottage or cabin. See TIR 95-7, DAR App. 448-49. Such a distinction has no relevance with respect to a corporate trustee's office. Moreover, unlike natural persons who may rotate between residences on a seasonal basis, it would be unusual for a corporate trustee to have a permanent, year-round physical location at which it engages in no activities for up to half the year. Section 1(f)(2)'s concept of a person traveling between States simply does not

translate to corporations.

The apparent purpose behind Section 1(f)(2) confirms that the Board erred by applying it to corporations. Section 1(f)(2) serves to fill a gap in Section 1(f)(1) that is unique to natural persons. Under the prior version of Section 1(f), residence turned on the concept of legal "domicile," an issue that for natural persons depends on one's subjective intent "to remain permanently or for an indefinite time" in Massachusetts. Dotson v. Commissioner of Revenue, 82 Mass. App. Ct. 378, 383 (2012), and cases cited. Under that test, a person's domicile may well be in another State even though she objectively spends most of the tax year here. As the Commissioner recognized in briefing below, see DAR App. 580, Section 1(f)(2) bridges that gap by introducing an additional, objective test for a natural person's place of residence: whether one maintains a "permanent place of abode" and is physically present here for more than half the year.

There is no similar objectivity gap for corporations. A corporation's domicile for purposes of Section 1(f)(1) already can be determined by either of two objective tests: its State of incorporation or the

location of its headquarters or main office. See Nat'l Leather Co. v. Commonwealth, 256 Mass. 419, 424 (1926); 830 Code Mass. Regs. § 63.38.1(2); see also Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303 (2006). There is thus no need and no good reason to apply Section 1(f)(2)'s residency test to corporate trustees, a situation for which it was not designed.

The Board's only basis for concluding otherwise was the directive in G. L. c. 62, § 14, that a corporation be "subject to this chapter in the same manner and under the same conditions as individual inhabitants of the commonwealth acting in similar capacities." That provision, however, does not specify when or how specific provisions must be applied to corporations. Nor does it explicitly require applying to corporations rules that make sense only as applied to individuals. See G. L. c. 62, § 1 ("[T]he following words or terms shall, unless the context indicates otherwise, have the following meanings...." (emphasis added)). Section 14's purpose is fully satisfied by taxing corporate trustees under Section 1(f)(1)'s objective (as to corporations) test for domicile.

Were there any doubt, this Court consistently has held that rules of taxation can be imposed only by

clear, explicit statutory language, Commissioner of Revenue v. Oliver, 436 Mass. 467, 470-71 (2002), and that any "ambiguities in taxing statutes are to be resolved in favor of the taxpayer." Xtra, Inc. v. Commissioner of Revenue, 380 Mass. 277, 281 (1979). The Commissioner conceded below that Section 1(f)(2) contains no unambiguous command to tax non-domiciled corporations. See DAR App. 529-30. While Section 1(f)(1)'s "domicile" language readily can be transferred to corporations consistent with Section 14, Section 1(f)(2) cannot. Background principles of tax law thus foreclose the Board's decision to apply Section 1(f)(2) to the Bank and U.S. Trust.

B. As Applied To Corporate Trustees, The Board's Interpretation Of Section 1(f)(2) Is Too Broad.

1. The Board's Test Violates Section 14.

Even if Section 1(f)(2) applies to corporate trustees, the Board's holding that every corporation with some "presence and activities" here is an "inhabitant" of the Commonwealth still would be incorrect as a matter of law. By opening the door for a corporate fiduciary to be deemed an "inhabitant" of every State where it has some permanent presence, no matter how limited, the Board's decision offends - not

honors - Section 14's command that corporations be treated on par with individuals.

Under Section 1(f)(2), a natural person is a statutory "resident" or "inhabitant" of Massachusetts only if he has a predominant physical presence here, demonstrated by owning a "permanent place of abode" here and spending at least part of more than 183 days here during the tax year. The paradigmatic example, reflected in multiple Board decisions, is someone who retires to Florida and now claims to be domiciled in that State, but who maintains a home in Massachusetts and resides here for more than 183 days a year. See, e.g., Evans v. Commissioner of Revenue, 38 Mass. App. Tax Bd. Rep. 5 (2013); Devens v. Commissioner of Revenue, 37 Mass. App. Tax Bd. Rep. 673 (2012).

Satisfying the criteria for residency under Section 1(f)(2) is difficult for natural persons to do. A New Yorker who owns a second home in the Berkshires and works there as a trustee for 26 straight weeks (182 days) in a given tax year would not be a statutory resident. Nor would a New Hampshire resident who commutes to work as a trustee in Boston every day but who owns no permanent place of abode here. Importantly, it is difficult to envision a

natural person who - by dint of owning a "permanent place of abode" and being present more than 183 days - could satisfy the Section 1(f)(2) test for more than one State (beyond her domicile). Thus, for natural persons, Section 1(f)(2) is conservative, biased against a finding of residency and unlikely ever to result in a taxpayer being deemed a resident of more than one State (beyond her legal domicile).

For corporations, however, the Board's decision reverses that conservatism. Under the Board's loose "presence and activities" test, a corporation is an inhabitant in every State where it "maintains a permanent place" at which it conducts some business for at least half the year. A national bank with hundreds of offices and tens, if not hundreds, of thousands of employees, of whom only a small fraction work here, would be a Massachusetts inhabitant. But a natural person who proportionately divided his time between Massachusetts and other States, spending only a fraction of his days here, would not be.

Neither Section 1(f)(2) nor Section 14 compels that disparate outcome. If Section 1(f)(2) applies to corporations then the Court should adopt a narrower test that better effectuates Section 14's goal of

treating individual and corporate trustees alike. For example, the Court might adopt a test requiring predominant corporate presence in Massachusetts (as measured by, e.g., revenue or personnel), or the test that the Commissioner advanced below, which focuses on where the trust is administered. See DAR App. 580-81. Such a test might turn on, e.g., where a trust's trust officer is located, and thereby point to only a single additional State of residence for the corporate trustee (beyond the State of corporate domicile).

Those alternatives are more consistent with Section 1(f)(2)'s treatment of individuals than the broad "presence and activities" rule the Board adopted. The key point is that Section 1(f)(2) does not itself set forth a specific test for corporate inhabitance and there are other, reasonable ways of applying that section to corporations that are more favorable to taxpayers. Under this Court's cases, the ambiguity in Section 1(f)(2) must be construed against the broad test the Board adopted and in favor of a narrower recognition of taxing authority. See, e.g., Oliver, 436 Mass. at 470-71; Xtra, 380 Mass. at 281.

2. The Board's Reading Of Section 1(f)(2)
Violates The Dormant Commerce Clause.

The Court also should conclude that Section 1(f)(2) does not have the reach the Board created for it because the Board's approach causes the statute to violate the Dormant Commerce Clause.

The Dormant Commerce Clause requires a taxing authority to satisfy a four-part test before it may tax interstate commerce (as the Commissioner seeks to do here, given that, e.g., the four trusts have no Massachusetts source income, SAF ¶ 25, DAR App. 276): (1) the taxpayer must have a sufficient nexus to the taxing jurisdiction, (2) the tax must be fairly apportioned, (3) the tax must be fairly related to benefits being conferred on the taxpayer by the taxing jurisdiction, and (4) the tax may not discriminate against interstate commerce. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

The Board's broad test for application of the fiduciary income tax to corporations under Section 1(f)(2) fails the Complete Auto test. Under the Board's test, the Commonwealth can tax the income of a

trust (meeting the other requirements of Section 10)⁷ based on the fortuity of the corporate trustee having some "presence and activities" here (e.g., a retail banking branch), even if there is no nexus to the trust in question (which is, after all, the actual taxpayer). The Board's application of the tax also is without regard to the benefits conferred on the trust by the Commonwealth, and does not account for the external-consistency element of the apportionment prong of Complete Auto. What is more, the Board's test discourages Massachusetts settlors establishing trusts outside the Commonwealth from selecting banks engaged in interstate commerce, instead of trustees present in only one State.

VI. STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Under Mass. R. A. P. 11(a), direct appellate review is warranted in cases presenting "questions of

⁷ Several courts have held that the other Section 10 factors - domicile of the settlor or domicile of the beneficiaries (or here, their statutorily presumed domicile) - cannot themselves support taxation of trust income under the Due Process and/or Dormant Commerce Clauses. Kimberly Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue, 2015 WL 1880607, at *9-11 (N.C. Super. Apr. 23, 2015); Residuary Trust A v. Dir., Div. of Taxation, 27 N.J. Tax 68, 72-76 (Tax Ct. 2013), aff'd, 28 N.J. Tax 541 (App. Div. 2015); Linn v. Dep't of Revenue, 2 N.E.3d 1203, 1208-11 (Ill. App. 2013); Robert L. McNeil, Jr. Trust v. Commonwealth, 67 A.3d 185, 191-98 (Pa. Commw. 2013).

first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court," and "questions of such public interest that justice requires a final determination by the full Supreme Judicial Court." This Court frequently has found these criteria to be satisfied (often sua sponte) in cases involving tax issues.⁸ For any one of several reasons, this tax case similarly meets the criteria for direct appellate review.

First, direct appellate review is warranted because this case presents a legal question of first impression. The Board's decision is the first from any Massachusetts tribunal addressing how Sections 1(f)(2) and 10(c) apply to a corporate trustee that is not

⁸ See, e.g., First Marblehead Corp. v. Commissioner of Revenue, 470 Mass. 497 (2015), cert. granted, vacated, & remanded, 83 U.S.L.W. 3895 (Oct. 13, 2015); Raytheon Co. v. Commissioner of Revenue, 455 Mass. 334 (2009); Town Fair Tire Ctrs., Inc. v. Commissioner of Revenue, 454 Mass. 601 (2009); AA Transp. Co., Inc. v. Commissioner of Revenue, 454 Mass. 114 (2009); Commissioner of Revenue v. Gillette Co., 454 Mass. 72 (2009); Geoffrey, Inc. v. Commissioner of Revenue, 453 Mass. 17 (2009); Capital One Bank v. Commissioner of Revenue, 453 Mass. 1 (2009); Bell Atl. Mobile of Mass. Corp., Ltd. v. Commissioner of Revenue, 451 Mass. 280 (2008); Household Retail Servs., Inc. v. Commissioner of Revenue, 448 Mass. 226 (2007); FMR Corp. v. Commissioner of Revenue, 441 Mass. 810 (2004). Indeed, the Commissioner sometimes has joined taxpayers' requests for review by this Court. See, e.g., Perini Corp. v. Commissioner of Revenue, 419 Mass. 763 (1995); Gen. Elec. Co. v. Commissioner of Revenue, 402 Mass. 523 (1988).

domiciled in Massachusetts. The Commissioner has not issued any regulation or other guidance answering that question. This Court's answer would provide definitive (and much-needed) guidance for corporate trustees and tax practitioners in the Commonwealth and beyond.

Second, this case presents an additional legal issue of first impression: the interplay between the situationally ambiguous command of G. L. c. 62, § 14, that corporate trustees be subject to taxation "in the same manner and under the same conditions as individual inhabitants," and the rules of statutory construction that the Legislature must unambiguously express its intent to impose a tax, and that any ambiguity be resolved in favor of the taxpayer. E.g., Oliver, 436 Mass. at 470-71; Xtra, 380 Mass. at 281. As this case illustrates, Section 14 is in obvious tension with these rules when it comes to tax provisions such as Section 1(f)(2) that have no readily apparent application to corporations. No matter how the Court ultimately resolves that tension with respect to Section 1(f)(2), lower courts, corporate trustees, and tax practitioners all are in need of the conclusive guidance that only this Court can provide.

Third, the public interest requires this Court to resolve this case. To begin, the questions presented here affect many thousands of taxpayers, i.e., trusts that have non-Massachusetts domiciled corporate trustees with a Massachusetts presence. The Bank alone has filed abatement applications for the 2007 tax year, based on this issue, as to nearly 3,000 separate trusts; other financial institutions might be administering thousands more trusts in a similar situation. Similarly, the public interest is raised here because of the administrative implications for the thousands of affected trusts. Each trust pays taxes annually and, unless the Board's decision is corrected, many now need to file tax returns in Massachusetts as well as in whatever other States they have been filing in all along. The reach of Sections 1(f)(2) and 10 should be resolved sooner rather than later, to provide both finality and clear guidance to taxpayers in a complex area.

The issues in this case also affect the public interest because many of the thousands of implicated trusts represent families' multi-generational savings. Many of those trusts' creators may have chosen an institutional trustee located in another State, such

as a small bank later acquired by a larger national bank, and had no reason to expect that the trust income would be taxed by Massachusetts. Under the Board's construction of Sections 1(f)(2), 10(c), and 14, however, those trusts' incomes suddenly may be taxable here.⁹ The Board's decision, which will impose new and unforeseen tax obligations on numerous family trusts, therefore presents an issue of great public interest that requires final determination by this Court.

Fourth, the public interest will be served by direct appellate review to resolve a question of legislative intent with respect to a matter of tax policy. The Board's ruling here authorizes a uniquely aggressive, extra-territorial assertion of Massachusetts' taxing power. The Board's construction leverages the fact that the Bank does some business in Massachusetts to do what no other State does: make a

⁹ For example, imagine a Massachusetts resident whose children live in California and who in 1980 created an irrevocable trust for his unborn grandchildren and their descendants, administered by a California bank, and then himself moved to California a year later. Trust administration at all times is performed at an office in San Francisco. Under the Board's decision, if that bank opens even a single branch in Massachusetts (or someday merges with a bank that has one), Massachusetts's fiduciary income tax - previously not applicable to the trust in question - suddenly would be imposed.

corporate trustee's presence and activities in the State, no matter how unrelated to the administration of the particular trust at issue (which is, after all, the actual taxpayer) and no matter how limited the connection, a deciding factor in imposing fiduciary income tax.

That expansion of the Commissioner's taxing authority may have negative consequences for banks with Massachusetts operations, insofar as it may lead some settlors to avoid using them. It also may lead some corporate trustees not to locate banking operations in the Commonwealth. There is no evidence that the Legislature intended these results when it passed the 1995 amendment that introduced Section 1(f)(2). To the contrary, the Legislature repeatedly has tried to use tax law to encourage banks and other businesses to locate their operations in the Commonwealth. See, e.g., First Marblehead Corp., 470 Mass. at 501-02 (St. 1995, c. 81, § 1, was meant to "reduc[e] incentives" for banks "to move their operations out of State"); Gillette, 454 Mass. at 76 (purpose of G. L. c. 63, § 31A, is "to create an incentive for certain businesses to locate their

operations in Massachusetts").¹⁰

To be sure, there are some States that impose fiduciary income tax based on something other than a corporate trustee's legal domicile. For example, as the Commissioner argued below and the Bank argues in the alternative here, see supra at 26-31, several States' fiduciary income tax laws focus on the place where the trust-administration work for a given trust is done. E.g., Cal. Rev. & Tax. Code § 17742(b); Minn. Stat. § 290.01, subd. 7b(b); Or. Rev. Stat. § 316.282(1)(d); Iowa Admin. Code § 701-89.3(2).¹¹ So far as the Bank is aware, however, no State's approach mirrors the Board's expansive interpretation of Sections 1(f)(2) and 10. Whether to construe Section 1(f)(2), if and as applied to corporations, in a manner better aligned to the taxation of trusts by

¹⁰ The issues presented also are broadly significant because the Board's rule places an unreasonable administrative burden on national banks, one that may become unmanageable if other States follow the Board's lead. National banks would need to check, for every trust with unascertained beneficiaries, whether the settlor, e.g., died or was "at any time during the year" an inhabitant of any State in which the bank has any permanent physical location, no matter how minor.

¹¹ A recent spate of state court rulings in the fiduciary income tax arena, handed down after the Bank began pursuing abatements from the Commonwealth, has forced States to re-examine their fiduciary income tax structures such that their reach is narrowed, not broadened. See supra at 30-31 & n.7.

other States, or instead to retain the uniquely aggressive test that the Board adopted here, is the type of decision that this Court, rather than the Appeals Court, traditionally is expected to make.

Finally, the interpretation of Section 1(f)(2) that the Board created presents an important constitutional question under the Dormant Commerce Clause of the U.S. Constitution. See supra at 30-31 & n.7. Massachusetts Rule of Appellate Procedure 11(a)(2) expressly contemplates direct appellate review of "questions concerning the Constitution of the United States." The need to construe Section 1(f)(2) to avoid that constitutional issue also implicates the public interest, warranting this Court's review in the first instance. The Supreme Court's decision in Comptroller of Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015), and its order granting the petition for certiorari, and vacating and remanding this Court's decision in First Marblehead, see 83 U.S.L.W. 3895 (Oct. 13, 2015) - both of which post-date the Board's initial decision in this proceeding - confirm the need for courts to carefully scrutinize state taxation of interstate commerce in cases such as this one in light of evolving

constitutional standards.

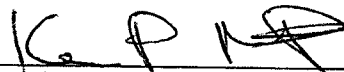
VII. CONCLUSION

For all these reasons, this Court should allow the Bank's application for direct appellate review.

Respectfully submitted,

Bank of America, N.A.

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Dated: October 30, 2015

CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for BANK OF AMERICA, N.A., hereby certify that I have served one copy of this Application For Direct Appellate Review by causing it to be delivered by email and by hand to Kirk Hanson, A.A.G., this 30th day of October, 2015.



Kevin P. Martin